Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

No. 91-6516

In The

# Supreme Court of the United States

October Term, 1992

EDWARD SOLDAL, et al.,

*Petitioners,*

vs.

COOK COUNTY, ILLINOIS, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY BRIEF FOR PETITIONERS

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## SUMMARY OF ARGUMENT

The Soldal family was routed from its home when deputy sheriffs and private citizens seized the home and towed it away. Respondents argue that petitioners should be denied relief under 42 U.S.C. §1983, contending that there was no state action and that the seizure was not covered by the Fourth or Fourteenth Amendments. Their arguments would undermine the special protection the Fourth Amendment has always given to the sanctity and security of the home, and have no support in history or this Court's precedents. Here, both the privacy and possessory rights of petitioners were cruelly violated by county police officers; their home was taken away, their lives disrupted. This case presents precisely the type of oppressive government conduct that the Fourth and Fourteenth Amendments were intended to prevent.

## ARGUMENT

### I. THE ACTIVE PARTICIPATION OF SEVERAL DEPUTY SHERIFFS IN THE SEIZURE OF PETITIONERS' HOME CONSTITUTED STATE ACTION

Viewing the facts as seen by Edward Soldal and his family, several Cook County deputy sheriffs actively helped his landlord take Soldal's home and make it unusable.[1] They restrained Soldal from resisting the illegal eviction, they refused to charge the landlord with criminal damage to property, they stood between Soldal and

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[1] Since the case is at the summary judgment stage, all factual inferences must be construed in favor of petitioners, and so long as there is a genuine issue of fact, and reasonable jurors could find for petitioners, summary judgment must be denied. *Adickes v. Kress and Co.*, 398 U.S. 149, 158-59 (1970); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986).

his landlord as workers carted off Soldal's home, and they arrested Soldal when he came to retrieve his children from the neighbors. The evidence showed a succession of meetings between the deputy sheriffs and landlord, admissions by the deputy sheriffs and private parties that they were working together, direct intervention by the deputy sheriffs to ensure that the seizure of petitioners' home was successful, and a concerted effort by the deputy sheriffs and private parties over a period of several hours, to ensure that petitioners were expelled from the mobile home park. *See* Pet. Br. 5-11. Against all this, respondent deputy sheriffs contend that this was only a "landlord/tenant dispute between private parties," and that they were merely present at the scene. Resp. Br. 5. Respondents' argument ignores the legal principles applicable to summary judgment, the standard of proof necessary to show state action, and the factual record. When these are considered, the Seventh Circuit's holding that "the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and public defendants" (J.A. 54), is wholly justified.

The simultaneous appearance of deputy sheriff O'Neill and the Willoway workers at the Soldal home at about 1:00 p.m. on September 4, 1987, and the statements of the workers and O'Neill, are in themselves sufficient evidence to support an inference of a prior agreement and show joint action.[2] The Willoway workers told Mr.

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[2] Even if deputy sheriff O'Neill were the only governmental participant in the joint action or conspiracy this would be sufficient to constitute state action. Private parties who conspire with public officials are liable under §1983 even if the official himself is not sued or is immune. *Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992); *Adickes v. Kress and Co.*, 398



Soldal to "ask the sheriff deputy" when he inquired what they were doing, and deputy sheriff O'Neill said he was there to see that Mr. Soldal did not interfere with Willoway's workers. The deputy sheriffs' active encouragement of the dispossession continued with lengthy meetings between Lieutenant Jones and agents of Terrace Properties, and Jones' statement to Mr. Soldal that the eviction was to continue and Mr. Soldal could not sign a complaint of criminal damage to property. Even respondents acknowledge that, prior to this time, they were aware that the dispossession was completely illegal.[3] Resp. Br. 4-5. By this time, there were four deputy sheriffs at the Soldals' home, all continuing to work with the Willoway workers, and all continuing to enforce O'Neill's initial order to Mr. Soldal that he must not interfere.

Lieutenant Jones continued his active cooperation with Willoway by telling Mr. Soldal to get his children and leave the park, and endorsing Hale's order that Mr. Soldal must leave and not come back. In addition, the failure of Chief Levy, Captain Jackson and Captain Wittsman to order the eviction stopped, at a time when they undoubtedly knew of its illegality, and had the power and duty to halt it, is evidence that they too entered into this common design to dispossess petitioners.

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U.S. 144; *Dennis v. Sparks*, 449 U.S. 24 (1980). Moreover, a motion to amend the complaint to add O'Neill as a named defendant was pending at the time that the district court dismissed the case. If this Court reverses and remands the §1983 seizure claim, petitioners will again seek to add O'Neill as a named defendant.

[3] In addition, it is reasonable to infer that deputy sheriff respondents were aware of the illegality of Willoway's conduct at all times, both because the facts show they did have such knowledge and also because a dispossession is presumptively illegal, and is privileged only when authorized by a court order.

State action is established if a private party "acted together with or has obtained significant aid from state officials." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Moreover, a party can draw upon a wide array of evidence, direct and circumstantial, to prove a conspiracy claim and need not show a formal agreement. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1945). A conspiracy may be proven by "a course of dealing or other circumstances as well as in an exchange of words . . . Where the circumstances are such as to warrant a jury in finding that the conspirators have a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." *Id.* at 809-10. The ability and opportunity to conspire are circumstantial evidence of actual participation in a conspiracy. *Adickes v. Kress and Co.*, 398 U.S. at 158. In sum, there are a myriad of ways in which a conspiracy may be shown and "the existence or non existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Id.* at 176 (Black, J., concurring). Under this legal standard, the facts established by petitioners warrant a reasonable jury to find that there was sufficient involvement by the deputy sheriffs to constitute state action.[4]

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[4] Deputy sheriff respondents have also argued that they are entitled to qualified immunity for their actions. Resp. Br. 11 n.2. No request for qualified immunity has previously been made, either in the district court, court of appeals, or respondents' brief in opposition to the petition for certiorari, and it should not be considered at this time, if at all. Petitioners will vigorously contest any claim of qualified immunity, if and when such claim is properly made. In addition, even if some or all of the public respondents were granted immunity this would not negate state action, and would not avail the private respondents. *Dennis v. Sparks*, 449 U.S. 24 (1980); *Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992).



## II. THE SEIZURE OF PETITIONERS' HOME VIOLATED THEIR POSSESSORY AND PRIVACY INTERESTS PROTECTED BY THE FOURTH AMENDMENT

### A. The Text and History Of The Fourth Amendment Support Petitioners' Right To Be Secure From Unreasonable Seizure Of Their Home.

The history surrounding the enactment of the Fourth Amendment, and the text of the Amendment itself, refute respondents' argument that the Amendment applies only to searches and seizures aimed at obtaining evidence. Respondents acknowledge that Writs of Assistance, and the wide authority they gave government agents to seize goods, were a major stimulus towards enactment of the Amendment. Resp. Br. 13. However, such seizures were not necessarily related to any criminal proceeding, or indeed any search for evidence, but rather to the recovery of uncustomed goods. Lasson notes that such writs authorized search and seizure but did *not* authorize arrest. Lasson, *The History and Development of the Fourth Amendment to the United States*, 53-54 (1937). Moreover, Writs of Assistance were themselves often used for private ends. In the *Writs of Assistance Case*, James Otis protested that the Writs allowed citizens to use "justices, sheriffs, constables, and all other officers" to search their neighbors' homes out of spite. John Adams reported that Otis argued:

> (O)ne of the most essential branches of English liberty is the freedom of one's house . . . . This writ (of assistance), if it should be declared legal, would totally annihilate this privilege.
>
> What a scene does this open! Every man prompted by revenge, ill-humor, or wantonness to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask for

> it from self-defense; one arbitrary exertion will provoke another . . . .

Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 Am. Crim. L. Rev. 1389, 1399. Lasson also recounts an incident where a customs officer was called before a justice to answer a charge and retaliated by searching the justice's house. Lasson, *The History and Development of the Fourth Amendment*, 60.

The text of the Amendment itself supports an expansive reading of its scope. The Amendment does not limit itself to criminal cases, or to searches for evidence, and contains no reference to the intention of the seizing officer. Rather, it declares in broad language that the security of the home shall not be violated by unreasonable seizures. The Amendment looks to the interests of the people in the security of their homes, interests that are affected equally whether the seizure is pursuant to a criminal investigation, a civil dispute, or for no reason at all. The Amendment is designed to protect the people from the arbitrary abuse of government power – precisely the type of abuse that occurred here.

### B. Consistent Precedents Of This Court Reject The Limitations On The Fourth Amendment Urged By Respondents And Support Application Of The Amendment To The Seizure Of Petitioners' Home.

This Court has consistently held that the Fourth Amendment applies to all seizures that affect possessory or privacy interests in homes and effects. Here, the possessory and privacy interests of the Soldals were violated, so the Fourth Amendment was implicated, and the fact that the Soldals were not suspected of criminal wrongdoing did not deprive them of the protection of the Amendment.



#### i. The Fourth Amendment is not restricted to evidence-gathering.

This Court has never limited the Fourth Amendment to searches for evidence. The syllogism that pervades respondents' argument is that because many of this Court's holdings involve officers engaged in seizures of evidence, the Fourth Amendment applies *only* to such seizures.

Respondents cite *Boyd v. United States*, 116 U.S. 616 (1885), for its suggestion that the Fourth Amendment rests upon a person's right not to incriminate himself. But that portion of the *Boyd* opinion, and its holding that the Fourth and Fifth Amendments protect a person against forced production of documents, has been expressly overruled. *See Fisher v. United States*, 425 U.S. 391, 407-14 (1976).[5] *Boyd* remains an important case, however, not least for its recognition that the protections of the Fourth Amendment are not limited to persons suspected of criminal wrongdoing; *Boyd* itself was a civil forfeiture case.

There are several cases which hold the Fourth Amendment applicable when officers are not searching for evidence. *Camara v. Municipal Court*, 387 U.S. 523 (1967), held that the Fourth Amendment governed searches that were designed to improve health and safety conditions and help property owners in the identification of potential problems, rather than secure evidence to be used against the property owner. *Id.* at 537. Similarly, in *Michigan v. Tyler*, 436 U.S. 499 (1977), the search was made for the "vital social purpose of ascertaining the cause of the fire," *id.* at 507-08, not to seek evidence for any type

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[5] *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1903), Resp. Br. 14-15, rested upon the same now-discredited theory that the Fourth Amendment protects against forced production of documents.

of criminal or civil proceeding. Nevertheless, this Court held that the search was governed by the Fourth Amendment:

> [T]he 'basic purpose of (the Fourth) Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.' *Camara v. Municipal Court,* 387 U.S. 523, 528. The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection.

*Id.* at 504.

In *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1976), this Court held the Fourth Amendment applicable to a seizure of automobiles that was made to satisfy a tax assessment, not to obtain evidence. *Id.* at 351. And in *Hudson v. Palmer,* 468 U.S. 517 (1983), the court rejected the Fourth Amendment claim because the Fourth Amendment does not apply in a prison cell, not because the seizure and destruction was not aimed at obtaining evidence. *Id.* at 527 n.8. Moreover, the Court has consistently held that inventory searches, which by their very nature are not for the purpose of discovering evidence, are subject to the Fourth Amendment's command that searches be "reasonable." *South Dakota v. Opperman,* 428 U.S. 364 (1976); *Illinois v. Lafayette,* 462 U.S. 640 (1983); *Colorado v. Bertine,* 479 U.S. 367 (1986).

In *O'Connor v. Ortega,* 480 U.S. 709 (1987), the motivation for the search of Dr. Ortega's office and the seizure of property was disputed. Dr. Ortega alleged it was to obtain evidence to use against him, while the hospital claimed it was merely a routine inventory of state property in the office of a terminated employee. *Id.* at 713. This Court was clear that the Fourth Amendment would



apply under either scenario, and enunciated the appropriate Fourth Amendment standards for both a "noninvestigatory work-related intrusion" and "an investigatory search for evidence of suspected work-related employee misfeasance." *Id.* at 723.

In its discussion of drug testing, this Court has not required that the search or seizure be for the purpose of gathering evidence against the person searched for the Fourth Amendment to apply. The toxicological tests in *Skinner v. Railway Labor Exec. Assn.,* 489 U.S. 602 (1989), were administered "not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.' " *Id.* at 620-21. Nevertheless, the search or seizure (*see, id.* at 617 n.4), was governed by the Fourth Amendment. Similarly, in *Treasury Employees v. Von Raab,* 489 U.S. 656 (1989), where the search was "not designed to serve the ordinary needs of law enforcement," but rather to "deter drug use" and "prevent the promotion of drug users to [sensitive] positions," *id.* at 666, the Court also held the Fourth Amendment applicable, with no suggestion that the Amendment controlled only if the intrusion was aimed at obtaining evidence.

Not only does the contention that the Fourth Amendment applies only to evidence gathering lack textual and precedential support, it also makes very little sense. If police are liable only when they are seeking evidence then "the worst kind of police search . . . , the search of the known innocent for purposes purely of harassment," Posner, *Rethinking the Fourth Amendment,* 1981 Sup. Ct. Rev. 49, 54, would fall outside of constitutional protection. Under respondents' theory, if police arbitrarily entered a supermarket and destroyed food they unreasonably claimed was contaminated, but did not retain

any of the food as evidence, they would be untouched by the Fourth Amendment. The more unreasonable the motivation for the seizure, and the less related it was to legitimate governmental ends, the more likely it would be that the Fourth Amendment would not apply.

**ii. The Fourth Amendment protects property rights.**

In *United States v. Place*, 462 U.S. 696, 701 (1982), this Court, holding that a violation of property rights was subject to the Fourth Amendment, noted that "the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment." Respondents, however, contend that the Fourth Amendment affords no protection to property rights, and that "a seizure of property in plain view is presumptively reasonable." Resp. Br. 20.

Respondents cite several cases that stress the importance of privacy concerns in Fourth Amendment jurisprudence, but such concerns do not negate the Amendment's protection of property rights, since privacy and property rights are in no way antagonistic and may often, as here, complement each other. *See, e.g., United States v. Place*, supra. Moreover, many of the cases cited by respondents run directly contrary to their argument. *Katz v. United States*, 389 U.S. 347, 350 (1967), held that Fourth Amendment "protections go further [than protecting individual privacy] and often have nothing to do with privacy at all," and then emphasized this point by quoting from Justice Black's dissent in *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965), in which he refers to a public seizure of property as violating the Fourth Amendment. *Katz*, 389 U.S. at 350 n.4.

Respondents also completely misconstrue the earlier case of *Warden v. Hayden*, 387 U.S. 294 (1967). In *Warden*



the Court stressed the importance of looking to expectations of privacy, rather than property rights, in determining whether a defendant's Fourth Amendment *privacy* rights were violated, but also held that, once the Amendment's privacy concerns had been satisfied, a seizure of property would still violate the Amendment unless there was a "nexus between the item to be seized and criminal behavior." *Id.* at 307. *Wyman v. James*, 400 U.S. 309 (1971), discussed at Resp. Br. 19, is simply irrelevant because it involved no seizure of property, but rather an alleged violation of privacy. Although the home visit by the case worker was for the purpose of helping the client, not to discover evidence to use against her, the Court held that the Fourth Amendment applied, but was not violated, because the visit did "not descend to the level of unreasonableness." *Id.* at 318. *Cardwell v. Lewis*, 417 U.S. 583 (1973), did, in the portion of the opinion quoted by respondents, stress the importance of privacy, rather than property, rights in determining whether a *search* of a car was constitutional. But in discussing the constitutionality of the *seizure* of the car – a portion of the opinion that respondents wholly ignore – the Court rested its decision on probable cause and the car's mobility, not privacy. *Id.* at 592-96. The court could not have been clearer that there were two different issues: a search in which privacy concerns, not property rights, were paramount, and a seizure in which probable cause and exigent circumstances rendered the violation of property rights reasonable.

Respondents' discussion of the "plain view" doctrine wrongly analyzes the cases it cites, ignores the many cases that run contrary to its thesis, and arrives at the remarkable conclusion that police may seize anything in

plain view. Respondents' assertion that protection of privacy is at the heart of the plain view cases is simply wrong. The concept of plain view arises only after privacy concerns have been satisfied, i.e., "when an officer's access to an object has some prior justification under the Fourth Amendment." *Texas v. Brown*, 460 U.S. 730, 738 (1982). At that point, "the owner's remaining interests in the object are merely those of possession and ownership," *id.* at 739, interests which are overcome if there is probable cause to believe the object is evidence of a crime, or is contraband. *Id.* at 742; *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Arizona v. Hicks*, 480 U.S. 321 (1986).

Contrary to respondents' assertion, there are numerous decisions by this Court holding that violation of property rights alone can violate the Fourth Amendment. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), one basis for the court's decision to reverse the conviction was the unreasonable seizure of the car, a seizure that, in itself, violated no privacy rights. Although *Coolidge's* inadvertence requirement for plain view seizures was subsequently overruled in *Horton v. California*, 496 U.S. 128 (1990), *Horton* re-emphasized that the Fourth Amendment protects bare possessory interests:

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.

*Id.* at 133. *Texas v. Brown*, 460 U.S. 730 (1982), involved no privacy concerns, since the suspicious object could be seen from outside the vehicle, but the seizure did affect property rights and thus was analyzed as a potential



Fourth Amendment violation. *Id.* at 741-2. In *Cardwell v. Lewis*, 417 U.S. 583, 592-96 (1974) and *United States v. Jacobsen*, 466 U.S. 109 (1983), the Court discussed the reasonableness of a seizure after having first concluded that no privacy concerns were violated, and in *Jacobsen* directly held that the Fourth Amendment's prohibition of unreasonable seizures could be violated by interference with property interests alone. *Id.* at 124-25.

Respondents completely distort the holding of *United States v. Place*, supra. The Court did not rest its analysis on the fact that the detention of the luggage was for the purpose of investigating its contents, and did not hold that Place's legitimate expectations of privacy in his luggage were implicated. Indeed, the Court specifically held that the detention was *not* for the purpose of a search, since a search would have required probable cause, which was lacking. *Id.* at 706-07. Rather, the Court looked to the interests of the traveler and identified two separate Fourth Amendment interests that were violated by the seizure – his "possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708. *Place* is thus wholly consistent with this Court's holdings that the Fourth Amendment protects property as well as privacy. Respondents' argument to the contrary is concocted by lifting inapposite quotations from this Court's discussions of privacy interests, distorting and transporting them outside of their context, and pretending that the Court was discussing property interests when in fact it was not. In many cases, as here, the violation of property interests implicates, coincides with, or exacerbates violations of privacy interests. However, even if there is only a bare violation of possessory interests, the Fourth Amendment must be satisfied.

### iii. Petitioners' privacy rights were violated.

The Soldals' home was taken away, their family broken up, they were forced to live in a building that was not their home, to travel when and where they did not choose, to sleep in beds that were not their own, and to otherwise rearrange their daily activities to accommodate this massive disruption in their lives. Respondents argue that this did not violate petitioners' Fourth Amendment right to privacy because their secrecy was not violated. Resp. Br. 23-26. This parsimonious reading of the Fourth Amendment is at odds with this Court's consistent protection of the sanctity of the home, and with the specific holding of *United States v. Place*, supra.

This Court has often noted that the Fourth Amendment protects reasonable expectations of privacy, and has not restricted the Amendment only to reasonable expectations of secrecy. *See, e.g., Katz v. United States*, 389 U.S. 347; *Smith v. Maryland*, 442 U.S. 735, 740 (1978). Moreover, the Court has always granted special protection to the home. The Court has held that the Amendment provides protection against "invasions on the part of government of the sanctity of a man's home *and* the privacies of life" *Boyd v. United States*, 116 U.S. 616, 630 (emphasis added), and has declared that "at the very core (of the Fourth Amendment) stands the right of a man to retreat into his own home and there be free from unreasonable governmental *intrusion.*" *Silverman v. United States*, 365 U.S. 505, 511 (1961) (emphasis added). It has noted that the Fourth Amendment provides protection against "the right of officers to thrust themselves into a home," and safeguards society's choice "to dwell in reasonable security *and* freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1947) (emphasis added). In *Payton v. New York*, 445 U.S. 573 (1979), the Court was not concerned with secrecy when it held unconstitutional a warrantless



entry into a home for purpose of arrest, not search, but based its ruling on the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Id.* at 601. And *Oliver v. United States*, 466 U.S. 170 (1983), stressed that the Fourth Amendment protects "intimate activities" in the home "from government *interference* or surveillance." *Id.* at 179 (emphasis added). This Court's Fourth Amendment decisions do not protect only a person's right to secrecy in his home but also a much broader right to engage in lawful activities without governmental intrusion.

Moreover, in *United States v. Place*, supra, this Court identified Fourth Amendment privacy interests outside the context of the home in circumstances directly relevant to this case. Respondents fail to cite or discuss *Place* in this portion of their argument, but as the *en banc* dissent recognized (J.A. 76-77), the injury to petitioners' privacy interests was far greater than the injury in *Place*. In *Place*, respondent's ability to continue his travel was compromised by the ninety minute detention of his luggage, and this violated his Fourth Amendment liberty interest in continuing on his journey. In this case, petitioners' ability to continue with their activities of everyday life was not just compromised but eradicated by the seizure of their home.

This is a classic case of abuse of government power to invade and violate the sanctity and security of the home that is guaranteed by the Fourth Amendment. The Fourth Amendment should govern.

## III. 42 U.S.C. §1983 IS AN APPROPRIATE REMEDY FOR THIS CONSTITUTIONAL VIOLATION

Respondents, arguing that "random misjudgment or misbehavior on the part of lower echelon state employees should not be regulated by the federal government under

the guise of §1983" (Resp. Br. 36), contend that petitioners should be denied relief because "providing petitioner (sic) redress through the Federal Constitution would not serve any of the three aims for which §1983 was enacted." Resp. Br. 37. Thus, respondents, in effect, ask this Court to restrict the scope of the Constitution based on their statutory construction of §1983. Such arguments have always been rejected by this Court.

42 U.S.C. §1983 renders liable in damages "every person who, under color of any statute, ordinance, regulation, custom or usage of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or amenities secured by the Constitution and laws." Section 1983 does not create rights, nor does it take them away. Rather, it is a mechanism for the enforcement of rights which are otherwise established. If respondents violated petitioners' constitutional rights, and if they are not entitled to a defense such as immunity, then they also violated §1983. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961).

Respondents also argue that actions taken under color of state law do not necessarily satisfy the "state action" requirement of the Fourteenth Amendment, and contend that such "state action" is missing here. Resp. Br. 37. This Court has long held, however, that "it is clear that in a §1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1981); *see also, Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966); *West v. Atkins*, 487 U.S. 42, 49 (1988). Respondents make no argument as to why this long line of authority should be overruled; they just ignore it.



Likewise, respondents contend that the existence of potential state law remedies should prevent petitioners from suing to vindicate the violation of their constitutional rights, but provide no compelling reason for overruling *Monroe v. Pape*, supra, *Zinermon v. Burch*, 494 U.S. 113 (1989), and a host of other cases which hold that "the federal [§1983] remedy is supplementary to the state remedy" *Monroe*, 365 U.S. at 163, and that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983." *Zinermon v. Burch*, 494 U.S. at 124. Respondents urge the Court to depart from this doctrine by threatening that provision of a remedy here will prove "extensive and expensive" and may "begin the process of eventually subsuming an area of regulation traditionally and properly regulated by the individual states." Resp. Br. 38, 37. In fact, providing petitioners justice under §1983 will do nothing to the sort. As respondents note, this case involves a "unique factual situation" (Resp. Br. 38), which is unlikely to recur with any regularity.

Moreover, this was not, as respondents contend, a mere commercial dispute. Respondents' persistent misdescription of this case as "a garden variety landlord/tenant dispute" (Resp. Br. 36, 2, 5, 26, 31, 38), ignores the crucial difference made by the intervention of armed police officers.[6] It was this intervention by state officers

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[6] This distortion of the factual record also pervades and undermines the *amicus* brief in support of respondents filed by the National League of Cities *et al.* That brief, which argues that, even if there was a Fourth Amendment seizure, it was reasonable, rests upon the erroneous assumption that all the deputy sheriffs did was stand by to keep the peace. While respondents are free to urge this version of the facts to a jury at trial, it is hardly uncontested, and cannot possibly provide the basis for summary judgment. *See supra* at 1-5.

on the side of the lawbreakers which both facilitated the seizure and fundamentally changed this from a private dispute to a constitutional violation. Had the deputy sheriff respondents behaved properly and in accordance with the law, this would not have been a constitutional case. Respondents could either have adopted a policy of strict non-interference, allowing petitioners to assert their right to resist the illegal seizure, or, more properly, should have prevented Terrace Properties' violations of state law, by threatening to arrest its employees if they proceeded with the trespass to petitioners' home. Thus, providing petitioners a §1983 remedy here will not swamp the courts with a flood of commercial litigation. In most cases, the police will act reasonably and will not ally themselves with lawbreakers. But when they act unreasonably, it is right and salutary that they should pay for their constitutional violations.

## IV. PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED

Respondents argue that their actions in summarily seizing and damaging petitioners' home were not sufficiently egregious to "shock the conscience," and that therefore petitioners' substantive due process rights were not violated.[7] This argument rests upon respondents' slant of the facts in the light most favorable to them, which is not appropriate on a motion for summary judgment. Because a fair view of the facts shows that there

[7] Respondents also argue that the existence of adequate state remedies forecloses any claim by petitioners for violation of their rights to procedural due process. This is not an issue in this case since petitioners have not pursued a procedural due process claim.



was a violation of petitioners' substantive due process rights, respondents' argument should be rejected.

The facts before the court of appeals and this Court "support an inference that the trailer park employees, aided by the actions of the sheriff's deputy, deliberately damaged the trailer" (J.A. 47, Judge Flaum dissenting), and deprived petitioners of their home. Respondents seek to characterize this as merely an illegal eviction with normal consequential damage, but it was clearly much more than that. The type of activity engaged in by these respondents implicated precisely the same type of values as the municipal ordinance at issue in *Moore v. East Cleveland*, 431 U.S. 494 (1976). There, the Court stressed the long established protections for the sanctity of the family and the home, and held that interference by the state with family life is subject to careful examination by this Court.

Though respondents quarrel with petitioners' characterization of their actions as depriving petitioners of their "fundamental right to their home," this is precisely what occurred. Surely it would "shock the conscience" for a municipality to hire armed agents to arbitrarily roust its citizens from their homes and then damage the structures so as to make them uninhabitable. This is what respondents did here. The crux of petitioners' claim is not an illegal eviction without proper process. Rather, it is the wholesale disregard of their uncontested legal right to continued quiet possession of their home, and to live their life free from arbitrary intrusion. This is a right that is sufficiently precious to be protected by the substantive component of the Due Process Clause.

## CONCLUSION

The Fourth Amendment protects petitioners' privacy and possessory rights against violation by these deputy sheriff respondents, and private parties. A jury should determine whether respondents' actions were reasonable and whether they violated petitioners' substantive due process rights.

Respectfully submitted,

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